STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT
(APPEAL FROM THE MICHIGAN COURT OF APPEALS)

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff/Appellee,

vs.

JOHN FRANCIS DAVIS,

Defendant/Appellant.
_____/

Michigan Supreme Court Docket No.
_____

COA No. 341621

Ingham CC: 17-406-FH

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DEFENDANT/APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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QUESTIONS PRESENTED

1. Can a defendant, while acting as an employee, be convicted of transporting cigarettes without a license in violation of the Tobacco Products Tax Act ("TPTA") in the absence of evidence establishing that he knowingly possessed or transported cigarettes contrary to the TPTA or, stated differently, that he knew that he was required to obtain a transporter license but did not do so?

2. Did the examining magistrate abuse her discretion in binding Defendant Davis over where the evidence at the preliminary examination failed to establish that Davis even knew that he was transporting cigarettes?

3. Does the TPTA give fair notice that an employee is required individually to obtain and possess a transporter license to deliver tobacco products?

I. STATEMENT OF ORDER APPEALED FROM AND RELIEF SOUGHT

Defendant/Appellant John Davis ("Davis") brings this Application for Leave to Appeal ("Application") from the Court of Appeals' unpublished[1] decision issued on February 5, 2019, that affirmed, on an interlocutory basis, orders entered by the Ingham County Circuit Court denying motions to quash the Information and to dismiss for a due process violation ("Decision"). (*See* Appendix A, Decision).

Davis has been charged with transporting cigarettes without a license in violation of the Tobacco Products Tax Act ("TPTA"), MCL § 205.421, *et. seq.,* and, in particular, MCL § 205.428(3), a felony offense. The State alleges that Davis transported cigarettes without obtaining a transporter license as purportedly required by MCL § 205.423.

Davis filed a motion to quash the Information arguing that: 1) the evidence produced at the preliminary examination ("PE") failed to establish that he even knew that he was transporting cigarettes; and 2) the examining magistrate applied the wrong *mens rea* element—mere knowledge that he was transporting cigarettes, as opposed to doing so contrary to the TPTA. In his Motion to Dismiss, Davis argued that the TPTA gives insufficient notice, in violation of his due process rights, that an employee can be held criminally liable for transporting tobacco products on behalf of his/her[2] employer unless the employee individually obtains a license.

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[1] On February 26, 2019, the State of Michigan Attorney General's Office filed a request for publication of the Decision on the grounds that it "construes a provision of a . . . statute" and "establishes a new rule of law," making publication mandatory. The request also asserted that "[t]his opinion, if published, would greatly assist in enforcing the tobacco laws in this State." Davis filed a statement opposing the request on March 12, 2019. The Court of Appeals panel denied the request for publication on March 21, 2019.

[2] Davis, for ease of reading, will only use the masculine pronoun for the remainder of his Application.

The trial court, and the majority of the Court of Appeals panel, concluded that the relevant statute only requires proof that a defendant have knowledge that he is transporting cigarettes, and that there was no deprivation of Davis' due process right to fair notice. The lower courts also found that sufficient evidence had been produced at the PE for Davis' bindover with respect to his knowledge that he was transporting cigarettes. As to the Court of Appeals' Decision, in particular, the majority found, based on nothing more than pure speculation, inadmissible evidence, and an impermissible imputation of constructive knowledge, that it was "less likely" that Davis did "not know what was in the truck" rather than requiring any actual direct or circumstantial evidence as proof of that knowledge.

The dissent rightly recognized that there is "[n]o evidence in the record [that] permits any reasonable inference of knowledge by Davis," making his bindover clearly incorrect as a matter of law and, thus, an abuse of discretion. (Appendix A, Dissent at 8). The dissent also aptly recognized the ongoing federal litigation between the State of Michigan and the Keweenaw Bay Indian Community[3], a federally recognized Indian tribal government ("KBIC")—which was Davis' employer at the time of the underlying charge over whether KBIC can lawfully be required to obtain a license under the TPTA. (*Id.* at 3 n.2, 5). The dissent also found that the State's prosecution of low-level employee defendants with no meaningful control over their employer's transportation operation—instead of prosecuting the true transporter, their employer—is contrary to the fundamental purposes of the TPTA and "amounts to an overreach that makes a mockery of both the Legislature's intent and fundamental justice." (*Id.* at 5).

In this Application, Davis contends that the statutory prohibition against transporting tobacco products "contrary to this act" requires the State to prove that he had knowledge of both

[3] The federal government is not a party to this litigation.

the fact that he was transporting cigarettes *and* that he did so in a way that was contrary to the TPTA. He requests this Court to adopt, in addition to his due process argument, Judge Ronayne Krause's dissenting opinion, finding that the lower courts incorrectly applied only the former *mens rea* requirement to the charge and that the PE evidence failed to establish even this lesser *mens rea* requirement as to Davis. The Court of Appeals committed clear error by using pure speculation, inadmissible evidence, improper inferences, and an incorrect application of a legal concept (*i.e.*, constructive knowledge) in determining that Davis knew that he was transporting cigarettes. It also erred when it incorrectly construed the TPTA's licensing provisions to apply individually to mere employees of a tribal government that engages in a broad range of governmental and revenue-raising activities, and found that the TPTA gave the requisite fair notice of such an application. Davis, therefore, respectfully requests this Court to grant his Application, reverse the Court of Appeals' Decision, and dismiss the charge of transporting cigarettes without a transporter license.

II. STATEMENT OF JURISDICTION

Davis timely brings this Application from the Court of Appeals' February 5, 2019, Decision, which affirmed the Circuit Court's order denying Defendants' joint motions to quash the Information and to dismiss the case for a due process violation. *See* MCR 7.305(C)(2)(a). This Court has jurisdiction to review Davis' appeal of that Decision. *See* MCR 7.303(B)(1).

III. STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

A. Material Facts

In December of 2015, Davis was a nonsupervisory employee of the KBIC, a federally-recognized Indian tribe. On December 11, 2015, as part of his employment with the KBIC, he was driving a pickup truck that was pulling a small cargo trailer en route from a KBIC facility. The truck, trailer, and all of the contents of the trailer belonged to the KBIC. Davis' co-worker and co-defendant, Gerald Magnant ("Magnant"), was a passenger in the truck.

At the time, unbeknownst to Davis and Magnant, Michigan State Police ("MSP") Detective Sergeant Kevin Ryan ("Ryan") and a MSP tobacco tax enforcement team were conducting an investigation involving KBIC. (PE at 52).[4] When Ryan and his partner, Detective Sergeant Chris Croley ("Croley"), observed trucks at a KBIC convenience store/gas station located on the tribe's reservation in Baraga, Michigan (PE at 52-53), they decided to surveil one of them and, acting purely on a "hunch," requested MSP dispatch to contact a trooper to initiate a traffic stop and pull the truck over (PE at 55-56, 86).

MSP Trooper Chris Lajimodiere ("Lajimodiere") was advised of the truck's location, clocked the truck on his radar traveling 62 mph in a 55 mph zone, and effectuated a pretext traffic stop. (PE at 12-13, 33, 43). Instead of simply issuing a traffic citation, the trooper questioned Defendants about where they were coming from and what they were hauling in the trailer. (PE at 17, 34-35).

When the trooper asked what was inside the trailer, he was told "supplies" and "chips" but significantly could not remember which occupant said what. (PE at 17-18). He asked Davis to let him look inside the trailer. (PE at 18, 37). Davis complied by exiting the truck, unlocking the trailer, opening the door and stating, "here you go, boss." (PE at 19, 37, 39). Inside the trailer, the trooper observed a number of brown cardboard boxes with the word "Seneca" on them. (PE at 19, 25). The police neither sought nor obtained permission to enter the trailer or to open any cardboard box containers.

Lajimodiere was not familiar with what the word "Seneca" meant (PE at 46) or whether Seneca was even a brand of cigarettes, so he waited for the tobacco tax enforcement team. (PE at

[4] All citations to "PE" herein are to the transcript for the first or March 16, 2017, session of the PE, which transcript is attached hereto as Appendix C.

47-49). After Ryan and Croley arrived, Ryan went into the trailer, opened one of the cardboard boxes, pulled out a carton of cigarettes, and opened it to check the cigarettes for a tax stamp. (PE at 56-58). The cigarettes had a KBIC stamp, which is not a recognized stamp of the Michigan Department of Treasury ("Treasury"). (PE at 58). At no time were either Davis or Magnant asked to produce a transporter or other tobacco-related license. (PE at 81).

Angela Littlejohn ("Littlejohn"), the Treasury manager of the Tobacco Tax Unit—the agency responsible for administering the TPTA and its related licensing requirements—testified at the PE that an individual who is transporting tobacco products on behalf of his or her employer would *not* need a license to do so if the employer were a licensed wholesaler or unclassified acquirer. (PE at 102). When asked whether Davis would need a transporter license if he were an employee of a wholesaler tasked with driving cigarettes to a customer, Littlejohn responded "no." (PE at 106). Littlejohn also testified that wholesalers and unclassified acquirers do not have to have the license on them while transporting, but that she was not sure whether other transporters would have to have the license on their person. (PE at 104-05).

Littlejohn also explained the requirements for obtaining a license. The first step would be to submit an application, known as a Form 336 (which was introduced as a defense Exhibit at the PE), with a $50 application fee to her department at Treasury. (PE at 108-09; *see also* Appendix B, Treasury Form 336). To her knowledge, Treasury does not publish any additional rules or regulations with respect to how to acquire the transporter license. (PE at 109). The only requirements, instructions, and guidance for applying for a transporter license are found on Form 336 itself, which specifically requires only a "business" involved in transporting tobacco to obtain a transporter license—not each individual employee transporting tobacco. (PE at 109, 111).

Doug Miller ("Miller"), the Administrator of Special Taxes for Treasury, was called as a defense witness and testified that his job involved making sure that taxes are being properly administered pursuant to the TPTA. (PE at 118). He reviewed Form 336 and confirmed that an applicant could rely on the information set forth on it. (PE at 121-22). He also testified that the law on this topic is very unclear and that Treasury provides no additional guidance or notice with respect to whether or under what circumstances employees must obtain a transporter license. (PE at 135-39).

B. Nature of the Action and Proceedings

1. Bindover and Motions to Quash and Dismiss

Davis was charged with a single count of violating the TPTA contrary to MCL § 205.428(3). In short, the State alleges that he possessed and/or transported cigarettes without obtaining a transporter license as purportedly required by MCL § 205.423.

Following a PE held in the 54-A District Court on March 16, 2017, and April 6, 2017, the examining magistrate issued an Opinion and Order binding each Defendant over to the Ingham County Circuit Court for trial on the charge against him. (*See* Appendix C, March 16, 2017, PE Transcript; Appendix D, April 6, 2017, PE Transcript; and Appendix E, District Court Judge Louise Alderson's April 24, 2017, Opinion and Order).

Davis filed a Joint Motion to Quash the Information, arguing, among other things, that: 1) the evidence adduced at the PE failed to establish the necessary *mens rea* element of the offense, *i.e.* that Davis knowingly possessed or transported cigarettes "contrary to this act" or with knowledge that he was required to obtain a transporter license but did not do so; and 2) the evidence failed to establish that Davis even knew that he was transporting *cigarettes*—as opposed to some other good – on behalf of KBIC.

Davis and Magnant also filed a Joint Motion to Dismiss for Due Process Violation, arguing that the TPTA fails to provide the requisite "fair notice" of the proscribed conduct such that charging them with a violation of the TPTA under the instant circumstances violated their due process rights guaranteed by the United States and Michigan Constitutions.

2. The Circuit Court's Decision

On November 30, 2017, the Ingham County Circuit Court entered written orders denying Defendants' motions (*see* Appendix F, November 2, 2017, Motion Hearings Transcript; Appendix G, Order Denying Defendants' Motion to Quash; and Appendix H, Order Denying Defendants' Motion to Dismiss for Due Process Violation), and entered an Order for Stay of Proceedings pending the Court of Appeals' rulings on Defendants' Applications for Leave to Appeal (*See* Appendix I, Order Staying Proceedings; Appendix J, Circuit Court Register of Actions).

3. The Court of Appeals' Decision

On July 18, 2018, the Court of Appeals granted Defendants' Applications for Leave to Appeal and *sua sponte* consolidated them. On February 5, 2019, it issued an unpublished[5] opinion affirming the trial court's orders denying Defendants' motions to quash the Information and to dismiss. Judge Ronayne Krause wrote separately in dissent, finding that the language and purpose of the TPTA require that Defendants have knowledge that they were not only transporting cigarettes but that they were doing so in violation of the TPTA. She also found that the district court erred in binding Davis over for trial due to insufficient evidence on the issue of whether he had knowledge that he was transporting cigarettes. Judge Ronayne Krause stated that she believed she did not need to reach the due process issue in light of her other findings. However, she did

[5] See discussion of the Office of the Michigan Attorney General's request for publication of the opinion, *supra* n. 1.

express her disagreement with the majority's decision that: "The defendants should somehow be aware that they might be committing a crime simply because their employer might lack a license." (Dissent at 8). Judge Krause specifically noted:

> Neither Michigan nor any other jurisdiction recognizes a doctrine of '*respondeat inferior*' as far as I can determine, and I would not adopt such a complete inversion of well-established agency law here. (Dissent at 8).

IV. ARGUMENT

A. Summary of the Argument

1. Summary of Argument: MCL § 205.428(3) Requires Proof that Davis Knew That he was Transporting Cigarettes and that His Conduct was "Contrary to this Act"

As relevant here, the TPTA requires that a person possessing cigarettes as a transporter must be licensed under the Act, MCL § 205.423(1), and, if that person "transports . . . *contrary to this act* 3,000 or more cigarettes," then he is guilty of a felony, MCL § 205.428(3)(emphasis added)(hereafter "Subsection (3)"). Subsection (3) does not contain an express intent element. Yet, it is well-established that, "[u]nder Michigan's common law, every conviction for an offense required proof that the defendant committed a criminal act (*actus reus*) with criminal intent (*mens rea*)," and, as a result, "courts will not lightly presume that the Legislature intended to dispense with the criminal intent traditionally required at common law." *People v. Janes*, 302 Mich. App. 34, 41-43 (2013) . Thus, even when a statute does not expressly include an intent element, a court must still determine, based on various factors, "'whether the Legislature nevertheless intended to require some fault as a predicate to finding guilt.'" *People v. Nasir*, 255 Mich. App. 38, 41-45 (2003).

There is no dispute here that *some* intent element applies to Subsection (3); rather, the dispute is over the level of that intent. The Circuit Court adopted, and the Court of Appeals

affirmed, an intent element that merely requires defendant to have knowledge that he was in possession of or was transporting cigarettes. This low-level intent element flies in the face of clear indicia of the Legislature's intent—as evident in certain legislative amendments—to impose a higher *mens rea* requirement. Such a low-level intent element is also otherwise inappropriate for a revenue offense. *See Nasir*, *supra*. Further, it risks making felons of workers who engage in the otherwise innocent activity of making deliveries for their employer. *Id.* It also permits the State to prosecute without offering evidence of intent regarding a required element—that the defendant transported "contrary to this act." For all of these reasons, and as explained in detail below, the Decision is not defensible. Subsection (3) requires the State to prove that a defendant had knowledge of both the fact that he was transporting cigarettes and that he was doing so "contrary to this act."

2. Summary of Argument: The State Failed to Offer Any Evidence that Davis Even Knew That He Was Transporting Cigarettes

The charge against Davis cannot proceed even under the lower intent threshold adopted by the courts below because the State offered insufficient evidence at the PE that Davis even knew that the product in the trailer that he was transporting was cigarettes, by relying on no more than the mere transportation itself. There is no reason to think that an employee like Davis, hauling his employer's locked trailer, filled with sealed boxes, which he did not load, necessarily has any knowledge of what the sealed boxes contain. There was no record evidence that Davis loaded the trailer, was present when the trailer was being loaded, or otherwise ever laid eyes on the inside of the trailer prior to opening it for the trooper. The lower courts engaged in rank speculation in finding that there was probable cause to believe that Davis knew the contents of the trailer. The Court of Appeals even acknowledged Davis' *exonerating* statements but inexplicably characterized them as evidence of guilt. In short, the State utterly failed to present any direct or

circumstantial evidence that Davis knew that he was transporting cigarettes and, thus, failed to satisfy even the lower intent threshold for a violation of Subsection (3).

3. Summary of Argument: The TPTA Does Not Give Fair Notice that Employees of a Transporter (or Other Licensee) May Be Required to Obtain their Own License—or Face Felony Charges

The TPTA licensing provisions do not give fair notice to workers who might transport tobacco products as part of their employment that they must individually obtain a transporter license; thus, the criminal charges against Davis for violation of Subsection (3) deprive him of his constitutional right to due process of law. Indeed, the plain language of the TPTA, when read as a whole, requires the conclusion that, as a low-level employee, Davis would not even be eligible for a license. When considered in its entirety, the overall statutory framework makes it clear that the transporter license requirement applies only to businesses, not to employees of such businesses. A "transporter" is a "person" who engages in transportation, and, while a "person" is defined to include an "individual" in addition to business entities like a corporation and a partnership, the term "individual," when read in context with the rest of the statute (as well as Form 336 Appendix B), is clearly meant to apply only to an individual operating a business on his own account.

By way of example, as the statute itself makes clear, licenses are required for each "place of business," not each employee, and license applicants are required to prove a net worth of at least $25,000. *See* MCL § 205.423(2), (6)(a). Further, the statute itself specifically mandates that the license "application shall be on a form prescribed by" Treasury, MCL § 205.423(2), and, thus, appears to incorporate that form as well as its contents into its licensing provisions. Treasury Form 336 is the only other guidance besides the statute itself for TPTA licensing, and clearly states—consistent with the statute's overall framework—that only "a business" is required to obtain a license. (*See* Appendix B.) Treasury officials responsible for administering the TPTA and its

licensing provisions confirmed that individual employees are not required to obtain licenses under the TPTA. Nevertheless, the Court of Appeals affirmed the Circuit Court's denial of Defendants' Joint Motion to Dismiss for Due Process Violation—an error of constitutional magnitude because, until Davis and Magnant were charged with violating Subsection (3), they had no way of even knowing that they could be liable for the offense as low-level employees of a tribal nation that engages in a broad range of governmental and revenue-raising activities, not only tobacco commerce.

B. There are Compelling Grounds for Granting Review under Michigan Court Rule 7.305(B) Because the Application Raises Issues Significant to the Public Interest and the State's Jurisprudence, and the Court of Appeals' Decision is Clearly Erroneous and Will Cause Material Injustice

This Court should grant Davis' Application because it presents issues of significant public interest involving the interpretation of a tax revenue statute as well as its application to employees in the context of a criminal tobacco tax prosecution. The majority and dissenting opinions in the Court of Appeals take opposing positions on the *mens rea* requirement for the charged offense. There are no prior controlling decisions interpreting the particular section of the TPTA at issue here and the members of the panel disagree on the application of certain prior Court of Appeals' decisions interpreting the TPTA. Specifically, the non-unanimous Court of Appeals' Decision here drew guidance from a published opinion interpreting a similar section of the TPTA and a non-binding opinion addressing the instant TPTA provision in dicta. This Application affords this Court the opportunity to settle the instant *mens rea* controversy and, in doing so, to clarify both the applicability and weight of such appellate case law.

It also presents the Court with the opportunity to eliminate the uncertainty as to whether the TPTA was actually intended to apply—and whether it gives fair notice of any such application—to individual, low-level employees of a tribal government. The Court of Appeals'

Decision in this case is critically important to the interests of every person in Michigan employed by an entity that transports tobacco products.[6] Following that Decision, all such employees may be subject to criminal charges unless they individually obtain a transporter license. The Court of Appeals recognized, to a small extent, the unfairness of applying the statute in this way and suggested that any employee who does not obtain a transporter license might avoid criminal liability by inquiring whether his employer holds such a license before the employee undertakes any duties for his employer. (Appendix A, Decision at 7.) But the Court of Appeals does not go so far as to hold that making such an inquiry would relieve the employee of criminal liability if the employer does have a license, and the possibility remains that the employee might still be subject to criminal liability even if the employer says it possesses a license.

The Decision further creates an impossible situation for many workers such as Davis who would not even be eligible to obtain a license individually. For example, in order to obtain a transporter license, the statute requires an applicant to show proof of a certain minimum net worth and that "the applicant owns, or has an executed lease for, a secure nonresidential facility for the purpose of receiving and distributing cigarettes and conducting its *business* if the applicant owns or has an executed lease for such a facility." MCL § 205.423(6)(a), (b) (emphasis added). Further, Form 336, the application form required by statute, expressly limits a transporter license as one for a "*business*" and otherwise requires certain application information for the "*business.*" (Appendix B)(emphasis added).

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[6] While the Court of Appeals has recognized that low-level employees of retailers are exempt from the TPTA's licensing provisions, the reasoning in its Decision here would appear to apply to low-level employees of manufacturers, wholesalers, and unclassified acquirers as well as transporters. This Court has recognized that low-level employees of retailers are exempt from the TPTA's licensing requirements. *People v. Assy,* 316 Mich. App. 302, 311-12 (2016).

In addition to the important public policy issues regarding the scope of the TPTA transporter license requirement, there are other compelling grounds for granting review because the Court of Appeals' Decision is, as shown in detail below, clearly erroneous and inflicts material injustice on Davis. First, contrary to legislative intent, the Court of Appeals' Decision would wrongly permit a felony conviction and a sentence of up to five years in prison based only on a low-level intent element—knowing transportation of cigarettes—that scarcely rises above a strict liability possessory offense. Second, Davis would be forced to stand trial even though the State failed to satisfy, to the requisite probable cause standard, that he even knew that he was transporting cigarettes. Finally, the TPTA does not provide fair notice to Davis as a mere employee that he is subject to any license requirement, and that the State could apply the TPTA accordingly. Against all notions of fair play and justice, the Court of Appeals' Decision would make Davis bear the severe consequences of the State's decision to apply the TPTA license provisions to him rather than the "true transporter," his employer.

C. The Court of Appeals Erred in its Construction of Subsection (3) by Incorrectly Applying Only a Lesser *Mens Rea* Element

1. The Charge

The Criminal Information here alleges that Davis, contrary to MCL § 205.428(3), "did possess, acquire, transport, or offer for sale 3,000 or more cigarettes, in the State of Michigan, without obtaining/possessing a Michigan tobacco license as required by MCL § 205.423." In short, the State alleges that Davis possessed and/or transported such cigarettes without obtaining a transporter license as purportedly required by MCL § 205.423.

MCL § 205.423(1) provides:

> [A] person shall not purchase, possess, acquire for resale, or sell a tobacco product as a manufacturer, wholesaler, secondary wholesaler, vending machine

> operator, unclassified acquirer, transportation company, or transporter in this state unless licensed to do so.

Subsection (3) of MCL § 205.428 provides, in pertinent part:

> A person who possesses, acquires, transports, or offers for sale contrary to this act 3,000 or more cigarettes . . . is guilty of a felony, punishable by a fine of not more than $50,000.00 or imprisonment for not more than 5 years, or both.

Thus, the State contends a person possessing cigarettes as a transporter must be licensed under the Act, and, if that person "transports . . . contrary to this act 3,000 or more cigarettes," then he is guilty of a felony.

2. Standard of Review

When reviewing a bindover decision, the following standards apply:

> A magistrate's ruling that alleged conduct falls within the scope of a criminal statute is a question of law reviewed [*de novo*] for error, and a decision to bind over a defendant is reviewed for abuse of discretion. In reviewing the district court's decision to bind over a defendant for trial, a circuit court must consider the entire record of the preliminary examination, and it may not substitute its judgment for that of the magistrate. Reversal is appropriate only if it appears on the record that the district court abused its discretion. . . . .Similarly, this Court reviews the circuit court's decision *de novo* to determine whether the district court abused its discretion.

People v. Beydoun, 283 Mich. App. 314, 322 (2009).

A district court's decision regarding a bindover is reviewed for an abuse of discretion, but a court necessarily abuses its discretion when it makes an error of law." *People v. Waterstone*, 296 Mich. App. 121, 132 (2012). The interpretation or construction of a statute is a question of law that is reviewed *de novo*. *People v. Morey*, 467 Mich. 325, 329 (1999); *People v. Moore*, 470 Mich. 56, 61 (2004).

3. The Court of Appeals Erred in Finding that the State May Prove a Violation of Subsection (3) Based on an Intent Element that Requires Only Knowledge that a Defendant Is Transporting Cigarettes

Under well-established principles of law for determining the intent element of a statutory offense, Subsection (3) requires the State to prove that a defendant had knowledge both of the fact that he was transporting cigarettes and that a license was required to do so (as the statute requires that such transport otherwise be "contrary to this act"). The Court of Appeals erred in finding that Subsection (3) requires only that the State prove that a defendant knew that he was transporting cigarettes as a basis for criminal liability—virtually devoid of criminal intent – thereby imposing severe punishment for conduct that causes only financial harm—in the form of a lost license fee to the State.

a. The *Nasir/Quinn* Factors Apply to Subsection (3) and Require an Intent Element that Davis Knew that he Was Transporting Cigarettes and that His Transportation was Contrary to the TPTA

Under Michigan's common law, every conviction for an offense requires proof that the defendant committed a criminal act (*actus reus*) with criminal intent (*mens rea)*. *Janes*, 302 Mich. App. at 41. Speaking of this philosophy of criminal law, the United States Supreme Court in *Morissette v. United States*, 342 U.S. 246, 250-51 (1952), explained:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory cry 'But I didn't mean to,' and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution. Unqualified acceptance of this doctrine by English common law in the Eighteenth Century was indicated by Blackstone's sweeping statement that to constitute any crime there must first be a 'vicious will'. . . .

While the Michigan Supreme Court has previously recognized that the Michigan Legislature can constitutionally enact statutes that impose criminal liability without regard to fault, Michigan

courts, in construing statutes, "will not lightly presume that the Legislature intended to dispense with the criminal intent traditionally required at common law." *Janes,* 302 Mich. App. at 42.

If a statute does not contain an express intent element, then the court must determine "whether the Legislature nevertheless intended to require some fault as a predicate to finding guilt." *Nasir*, 255 Mich. App. at 41 citing *People v. Lardie,* 452 Mich. 231, 239 (1996). In doing so, courts may consider seven factors, as set forth in *Nasir* and *People v. Quinn*, 440 Mich. 178, 190 n.14 (1992).[7] The seven factors are whether the statute: 1) defines a public welfare offense; 2) addresses potential harm to the public at large; 3) carries a severe punishment and damage to reputation upon conviction; 4) would, without an intent element, criminalize a broad range of otherwise innocent conduct; 5) would, with an intent element, impose an oppressive burden on prosecutors; 6) affords an opportunity to ascertain the true facts; and 7) has relevant legislative history or interpretive guidance from other statutes. This analysis does not merely determine whether *some* intent element applies; it also informs the level of that intent element. All of the *Nasir/Quinn* factors weigh strongly in favor of an intent element requiring proof that Davis knew both that he was transporting cigarettes and that such transportation violated a provision of the TPTA (*i.e.,* that he was required to obtain a transporter license but did not do so).

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[7] If the "statute at issue is a codification of the common law" and "*mens rea* was a necessary element of the crime at common law," then the statute will not be interpreted "as dispensing with the knowledge as a necessary element." *Nasir*, 255 Mich. App. at 38, 41-42 (citing *Quinn,* 440 Mich. at 186). The TPTA has no common law roots. Enacted in 1993, "it is at its heart a revenue statute, designed to assure that tobacco taxes levied in support of Michigan schools are not evaded." *Value, Inc v. Dep't of Treasury*, 320 Mich. App. 571, 577 (2017). Accordingly, this factor does not inform the analysis of what intent element applies to Subsection (3).

i. The TPTA is a Revenue Statute, Not a Public Welfare Law, and Violation of Subsection (3) Causes No Harm to the Public

The TPTA is a revenue statute, not a public welfare law. *Value, Inc.*, 320 Mich. App. at 577. Transporting cigarettes without a tobacco license is not a dangerous activity and it causes no physical harm to the public. Notably, prosecuting the driver of a truck transporting contents that he does not own and that he is hauling at the direction of his employer fails to advance the revenue-compliance purpose of the TPTA because low-level employees do not have the necessary knowledge of or control over their employer's operations for the purpose of ensuring compliance. "Transporters" are not responsible for collecting or remitting tobacco tax nor do they have any role or responsibilities with respect to the handling of tobacco tax stamps.

When someone acts as a "transporter" without a license, the harm to the public is, at worst, the loss of the $50 license fee payable to Treasury. Mere loss of revenue—even in more substantial amounts—is not a harm to the public at large. *Nasir*, 255 Mich. App. at 45. Further, as the dissent aptly pointed out, "[p]rosecuting ministerial agents like defendants would not further the goal of ensuring tax revenue is properly collected from the ultimate consumers of tobacco products" and there is "no Michigan authority suggesting that an agent may be held strictly liable for the misconduct of [his] principal." (Appendix A, Dissent at 6). Accordingly, this factor weighs strongly in favor of a more stringent intent requirement.

ii. Without a More Stringent Intent Requirement, Subsection (3) would Criminalize "a Broad Range of Apparently Innocent Conduct"

There is nothing inherently criminal in the act of transporting cigarettes. Indeed, the TPTA itself implicitly recognizes that transporting cigarettes is generally innocent conduct—it specifically exempts interstate carriers from the transporter licensing requirement, even if the carrier is transporting or delivering cigarettes in Michigan. *See* MCL § 205.422(y). Here, the

criminality of transporting cigarettes without a license in Michigan turns on the size and scope of the operations, not the inherent nature of the underlying conduct. Thus, imposing a low threshold for the intent element of Subsection (3) could potentially criminalize a broad range of innocent conduct. This logic applies with particular force to a revenue statute like the TPTA. The United States Supreme Court has recognized that "the proliferation of statutes and regulations has sometimes made it difficult for the average citizen to know and comprehend the extent of the duties and obligations imposed by the tax laws," and that it is, therefore, only appropriate to punish knowing violations of the law "because in 'our complex tax system uncertainty often arises even among taxpayers who earnestly wish to follow the law.'" *Cheek v. United States,* 498 U.S. 192, 199-200, 205 (1991).

Moreover, as discussed in detail in Part E below, the statutory licensing provisions for transporters do not provide adequate notice of the circumstances, if any, under which mere employee drivers (as opposed to their employers) are required to obtain a transporter license. Further, as is evident in the TPTA itself, Form 336, as required by the TPTA, and Treasury's sound interpretation of the TPTA—which is critical here because as Treasury administers the licenses, employees of an entity engaging in tobacco commerce are not required to obtain a license separate from their employer. Thus, if anyone, the true transporter and not its low-level agents should be charged.

iii. The TPTA Imposes Severe Punishment and Significant Damage to Reputation—Penalties that Should Only Apply upon Proof of Criminal Fault

If the "punishment provided for in the statute and the danger that conviction poses to a defendant's reputation is severe," then an intent element should be required. *Nasir*, 255 Mich. App. at 43-44 (quoting from prior precedents noting that "felony is . . . as bad a word as you can

give to a man or thing"). A violation of Subsection (3) is a felony that would not only severely damage Davis' reputation, but would expose him to a 40-60 month sentence and a maximum fine of $50,000. This punishment weighs in favor of requiring a more stringent intent element in Subsection (3), as reflected in the TPTA's subsequent amendments and legislative history.

iv. Prosecutors Would Not Face an Oppressive Burden if Required to Prove The Proposed Intent Element

Criminal offenses generally require some proof of intent—strict liability offenses are the rare exception to the rule. *See Janes*, 302 Mich. App. at 41. Prosecutors have the tools and techniques to prove intent for all manner of actions and do so every day—the task is not "so difficult that it cannot be established through minimal circumstantial evidence" and the intent element urged by Davis does not impede ascertaining the facts of the incident. *Nasir*, 255 Mich. App. at 45; *Quinn,* 440 Mich. at 190 n.14. The State does not contend that there is anything that sets Subsection (3) apart in this respect; thus, there is no basis for finding that any purported burden on the prosecutor warrants a minimal intent requirement for Subsection (3). Further, imposing a 5-year prison sentence should require the State to make some showing that the penalty is deserved.

v. Legislative History and Interpretive Guidance Favors a More Stringent Intent Requirement

Importantly, the legislative evolution of the TPTA also points to the *mens rea* element urged by Davis. Indeed, the very thrust of the legal factors discussed herein is to determine whether and to what extent the Legislature "'intended to require some fault as a predicate to finding guilt.'" *Nasir*, 255 Mich. App. at 41-45. Thus, carrying out legislative intent is the key objective here.

Tellingly, the Legislature amended MCL § 205.428 in 2008, by, among other things, adding Subsection (11), a misdemeanor offense that is otherwise identical to the felony offense in

Subsection (3), but with a smaller quantity, and that expressly contains a "knowingly" element.[8] *See generally* 2007 MI SB 882 (as enacted January 9, 2009); MCL § 205.428(11) ("A person who *knowingly* possesses, acquires, transports, or offers for sale *contrary to this act* 600 or more, but not more than 1,199 cigarettes, tobacco products other than cigarettes with an aggregate wholesale value of $50.00 or more but less than $100.00, or 600 or more, but not more than 1,199 counterfeit cigarettes, counterfeit cigarette papers, gray market cigarettes, or gray market cigarette papers is guilty of a misdemeanor punishable by a fine of not more than $1,000.00 or imprisonment of not more than 90 days, or both.") (emphasis added). Thus, rather than abrogate *Nasir* or expressly disclaim any *mens rea* element in MCL § 205.428, the Legislature made clear that it intended a specific *mens rea* element (*i.e.*, "knowingly" transports "contrary to this act" X amount of cigarettes) even for a mere misdemeanor under this revenue statute.

All of the *Nasir/Quinn* factors weigh in favor of finding an intent requirement that contains a level of wrongdoing sufficient to ensure that the severe penalty of 5 years imprisonment (and

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[8] The legislative history to Senate Bill 882, adding Subsection (11) to MCL § 205.428 with the term "knowingly" expressly contained therein, reflects that: 1) the amendment was to add to the TPTA "specific criminal and civil penalties for violations of the act involving smaller quantities of cigarettes or other tobacco products than currently trigger such penalties"; 2) the Legislature was simultaneously amending the General Sales Tax Act, MCL § 205.51, *et. seq.*, to, among other things, "allow the state treasurer to prohibit the sale of any products subject to the sales tax at any location where a person had *knowingly* violated certain specified provisions of the" TPTA (*i.e.*, Subsections (3) to (7) and (11) of MCL § 205.428); and 3) thus, in including the term "knowingly" in the misdemeanor provision in Subsection (11), it appears that the Legislature may even have intended to require actual knowledge of violating the TPTA. *See* 2007 Legis. Bill Hist. MI SB. 882 (legislative analysis, Dec. 18, 2008; *id.*, May 12, 2008; Senate Fiscal Analysis, Jan. 8, 2009) (also expressly noting that "[t]he proposed penalty for a quantity of 600 to 1,199, or a value of $50 to $99.99, would apply to offenses committed *knowingly*") (emphasis added). *See also* 2007 MI SB 883 (as enacted January 9, 2009, amending the General Sales Tax Act by, among other things, adding Subsection (6)); MCL § 205.53(6) ("The state treasurer or his or her designee may prohibit the sale of any products subject to the tax levied under this act at any location where a person *knowingly* violated section 8(3) to (7) and (11) of the tobacco products tax act, 1993 PA 327, MCL 205.428") (emphasis added).

fines) is imposed only upon a defendant who acted with an "evil state of mind" and to justify making criminal the otherwise innocent act of transporting cigarettes. *See Morissette,* 342 U.S. at 264. Thus, the offense of "transport[ing] . . . contrary to this act 3,000 or more cigarettes" requires proof that a defendant knowingly transported: 1) contrary to this act [*e.g.*, without a license]; 2) cigarettes. Merely possessing or transporting cigarettes is not inherently harmful to the public or otherwise indicative of any criminal fault. Rather, such fault or culpability attaches only by applying the intent element to *all* the elements of the offense, and any other approach would impose severe consequences on conduct that is essentially harmless. As Judge Ronayne Krause aptly noted in her dissent, requiring proof that a defendant had a general awareness that he was transporting cigarettes in violation of the TPTA "reasonably balances fundamental fairness, the purposes of the TPTA, and the need for realistic law enforcement." (Appendix A, Dissent at 8 n.9).

b. *Nasir* Addressed a TPTA Provision Similar to Subsection (3) and Found an Intent Requirement that Aligns with Davis' Position

Nasir not only set forth the analytical framework for determining the intent element of a criminal offense, but it also applied that framework to a provision of the TPTA that has substantial similarities to the one at issue here—and supports finding that the intent element of Subsection (3) requires knowledge that possessing or transporting cigarettes is contrary to the TPTA in some respect. In *Nasir*, the court considered whether MCL § 205.428(6) ("Subsection (6)"), a subsection of the same TPTA statute that is at issue here, contained a *mens rea* requirement. Subsection (6) states:

> A person who manufactures, possesses, or uses a stamp or manufactures, possesses, or uses a counterfeit stamp or writing or device intended to replicate a stamp without authorization of the department . . . is guilty of a felony.

The *Nasir* Court found that a Subsection (6) offense requires "knowledge that the stamp, writing, or device was not an authentic tax stamp." 255 Mich. App. at 39, 46. The court held that, while Subsection (6) does not expressly include a fault element, the Legislature, nevertheless, "intended to require some fault as a predicate to finding guilt." *Id.* at 41 (internal quotations omitted). Thus, the intent element is tied to what fundamentally distinguishes the offense from otherwise innocent conduct—a defendant's knowledge that the stamp in his possession is counterfeit. The corresponding application of this principle to Subsection (3) is to require the State to prove that a defendant knew that his possession or transportation of cigarettes was contrary to the TPTA in some respect. Otherwise, the State could prove a violation of Subsection (3) without establishing any element of fault or culpability whatsoever.

4. The Court of Appeals Erred by Disregarding the *Nasir/Quinn* Analysis, Ignoring a Statutory Intent Element of the Charged Offense, and Improperly Extending the Holding of *Shouman*, an Unpublished and Unpersuasive Case

Though it purported to agree that the *Nasir/Quinn* factors required the application of an intent element to Subsection (3), the Court of Appeals did not actually apply the *Nasir/Quinn* analysis in reaching its conclusion. Instead, it disregarded the compelling reasons that emerge from the *Nasir/Quinn* analysis for requiring a more stringent intent element for Subsection (3) and adopted an intent element that barely rises above strict liability possessory offenses requiring only that the State prove that Davis knew he was transporting cigarettes. The Court of Appeals made three principal errors in its analysis. First, instead of addressing Davis' argument that Subsection (3) requires a general knowledge that one is acting "contrary to this act," the Court of Appeals characterized it as an argument for specific intent—and incorrectly applied *Nasir* to reject it. Second, the Court of Appeals improperly disregarded "contrary to this act" as an intent element of the offense. Third, the Court of Appeals inappropriately relied on *Shouman*—an unpublished case

that addressed the *mens rea* element required for Subsection (3) only in dicta and that is otherwise unpersuasive—and applied it retroactively.

a. The Court of Appeals Interpreted Davis' Argument and *Nasir's* Statement on Specific Intent Incorrectly

Davis contends that the appropriate intent element for Subsection (3) is proof of: 1) knowledge by defendant that he is in possession of or transporting cigarettes; and 2) knowledge that he is doing so "contrary to this act" (*i.e.,* with knowledge that he was required to obtain a license but did not do so). Importantly, Davis does not contend that Subsection (3) requires a showing of specific intent, as such—*i.e.*, knowledge of the particular TPTA provision at issue and the intent to act in violation of it. Rather, he contends that Subsection (3) requires a showing of general intent for each intent element of the offense. Thus, the statute does not require proof that a defendant had any knowledge of either the specific legal source of the license requirement or even that there are criminal penalties for a license violation. Instead of addressing Davis' position squarely however, the Court of Appeals characterized it as claiming that Subsection (3) requires "specific intent" to violate the license provisions of the TPTA. The Court of Appeals then invoked the *Nasir* Court's statement that it did "not believe that the Legislature intended that the offense

contain a specific intent element."[9] *See Nasir*, 255 Mich. App. at 46. The Court of Appeals incorrectly relied on this statement to reject Davis' position.[10]

The intent requirement that Davis advocates—general awareness that transportation of cigarettes is "contrary to this act"—aligns with *Nasir's* requirement that the defendant must have knowledge of the counterfeit or illegal nature of the stamp; as a defendant need not know the specific provision of the TPTA at issue to know that fault attaches to the use or possession of a counterfeit stamp. The knowledge that a stamp is not authentic or "counterfeit" and, thus, by its nature, unlawful demonstrates the assumption of legal risk and attendant consequences of using or possessing it, thereby making the conduct blameworthy. Likewise, possessing or transporting cigarettes is not, in itself, culpable or blameworthy unless it is done with knowledge that they are being possessed or transported under circumstances that make it improper to do so.[11] A defendant

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[9] To the extent that *Nasir* found that the Legislature did not intend the offense in Subsection 6 to "contain a specific intent element" or to require that "a defendant need act with knowledge that … [he] does so without the authorization of the … Treasury," 255 Mich. App. at 46, it is important to note that *Nasir,* decided in 2003, pre-dated the Legislature's 2008 amendments to MCL § 205.428, which strongly suggest that the Legislature did intend to require actual knowledge of violating the TPTA. If this Court, upon granting review, were to determine as a matter of law that the Legislature actually intended to require specific intent due to, for example, Subsection (3)'s "contrary to this act" language (which is not included in Subsection (6)), "[s]tipulations of law are not binding on the courts," as the dissent aptly noted. (Appendix A, Dissent at 6)(citing *In re Finlay Estate*, 430 Mich. 590, 595-96 (1988)).

[10] While one can easily define specific intent as "a particular criminal intent beyond the act done" and general intent as the intent simply to do the physical act, the ease of stating this distinction belies the difficulty of applying it in practice. *See People v. Langworthy*, 416 Mich. 630, 639 (1982).

[11] The United States Supreme Court's decision in *Ratzlaf v. United States*, 510 U.S. 135 (1994), helps to illustrate this distinction. In *Ratzlaf*, the defendant was charged with violating provisions of the Bank Secrecy Act. Pursuant to 31 U.S.C. § 5313(a), banks and other financial institutions were required to report any transactions that exceeded $10,000.00. Under 31 U.S.C. § 5324(3), it was illegal to structure or break into two or more or separate transactions, a single cash transaction with a bank or other financial institution for the purpose of evading the reporting requirement of Section 5313(a). Ratzlaf was charged with violating 31 U.S.C. § 5322(a), which provided that a person who willfully violated the anti-structuring provision of Section 5324 is subject to criminal

can know that he does not have the requisite license to possess or transport a certain item without knowing the specific legal source of that requirement or that it is a crime to do so. Davis' position imposes no greater intent requirement than what the *Nasir* Court specifically endorsed. The *mens rea* element adopted by the Court of Appeals majority here, however, would not carry any level of "fault" or "culpability" at all.

In short, the Court of Appeals' reliance on the *Nasir* Court's statement on specific intent is entirely misplaced. The *Nasir* Court was merely rejecting the notion that a defendant must have specifically intended to violate that section of the TPTA—that is consistent with Davis' argument here; the court, however, was not backtracking on its holding that a defendant had to know that a stamp was counterfeit in order to be guilty of using or possessing a counterfeit stamp.

b. The Court of Appeals Improperly Disregarded "Contrary to this Act" as an Intent Element of Subsection (3)

Subsection (3) sets forth the felony of "possess[ing], acquir[ing],transport[ing], or offer[ing] for sale contrary to this act 3,000 or more cigarettes." Instead of interpreting the term "contrary to this act" as an element of the offense subject to the knowledge requirement, the Court of Appeals found that it merely "describes the unlicensed status of the tobacco transporter,

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penalties. The trial court instructed the jury that the government had to prove both that the defendant knew of the Section 5313(a) reporting obligation and that he attempted to evade that obligation, but it did not have to prove that he knew that the structuring in which he engaged was unlawful. The Supreme Court reversed the conviction, giving effect to the statute's "willfulness" requirement by holding that the government had to prove that the defendant acted with knowledge that the structuring in which he engaged was unlawful, not simply that the defendant's purpose was to circumvent the bank's reporting obligation.

The Court's reasoning is instructive here. The anti-structuring provision in *Ratzlaf* is akin to the "contrary to this act" requirement in this case. Just as the government had to prove knowledge of the structuring provision that Ratzlaf evaded, the State here must show Davis' knowledge of the licensing requirement and his intention to violate a known legal duty. Davis is not arguing that the prosecution must prove knowledge of the criminal offense but only that he was aware that he was transporting or in possession of the cigarettes "contrary to this act."

possessor, or manufacturer, rather than the knowledge of the defendants." (Appendix A, Decision at 4). As an initial matter, "[w]hen several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all." *United States v. Ron Pair Enterprises, Inc.,* 489 U.S. 235 (1989) (quotations omitted). Here, the words "contrary to this act" modify "possess[ing], acquir[ing], transport[ing], or offer[ing] for sale." The modifying clause, "contrary to this act," is applicable as much to the first and other verbs as to the last, and the natural construction of the language demands that the clause be read as applicable to all, qualifying not just the last word but the entire series. *See Paroline v. United States,* 134 S.Ct. 1710, 1714 (2014).

Thus, as relevant to Davis here, Subsection (3) criminalizes "transport[ing] . . . contrary to this act 3,000 or more cigarettes." Further, when reading in the "knowingly" requirement that is evident from the legislative history and Subsection (11), Subsection (3) criminalizes "[knowingly] transport[ing] . . . contrary to this act 3,000 or more cigarettes." The Court of Appeals offered no explanation for why the Legislature would include language—"contrary to this act"—that supposedly merely "describes" the nature of the offense in a statutory provision that actually defines the offense itself. Indeed, there is no reasonable explanation.

The Court of Appeals attempted to justify its construction by relying on yet another statement from *Nasir*—here, the finding that the intent requirement for Subsection (6) did not go so far as to require proof that the defendant "act[ed] with knowledge that the defendant does so without the authorization of the Michigan Department of Treasury." The Court of Appeals concluded incorrectly that the "contrary to this act" element of Subsection (3) is comparable to the Subsection (6) element of "acting without authorization of the Michigan Department of Treasury." It is not an appropriate comparison. Rather, the *Nasir* Court had already established an intent

element—knowledge that the stamp was counterfeit—that would permit a conviction only upon a showing of actual criminal fault or culpability. The Court of Appeals made no corresponding finding of such an intent element for Subsection (3). Further, as a general matter, most people possessing tax stamps known to be counterfeit would necessarily also know they are doing so without Treasury's authorization, thereby making any additional intent element as to such authorization duplicative.

c. *Shouman* is Unpublished, Unpersuasive Dicta That Cannot Be Applied Retroactively

The Court of Appeals improperly relied on dicta in *People v. Shouman*, an unpublished *per curiam* opinion of the Court of Appeals issued on October 4, 2016, to justify its interpretation of the intent requirement for Subsection (3). (*See* Appendix K, *People v. Shouman*, No. 330383, 2016 Mich. App. Lexis 1812). Shouman was charged with violating Subsection (3). On interlocutory appeal of the trial court's order adopting the prosecution's proposed jury instruction, the defendant argued that the trial court had incorrectly concluded that Subsection (3) creates a strict liability offense. 2016 Mich. App. Lexis 1812, at *2. The *Shouman* Court found the "premise of" the defendant's argument faulty because the trial court's jury instruction did require "proof of some knowledge on the part of [the] defendant," and, therefore, found it "unnecessary" to determine whether the offense was a strict liability crime. *Id.* at **2, 7-10, 13. Importantly, the *Shouman* Court found that the defendant had waived the argument that a different intent element applied because he had not preserved the issue for appeal. *Id.* at **13-14. In dicta, the *Shouman* Court was dismissive of the argument that Subsection (3) is a specific intent crime requiring "proof that [the] defendant knew [that] he was required to have a license in order to transport tobacco

products *and that he specifically intended to violate the TPTA*."[12] *Id.* at *13 (emphasis added). But that is not what Davis contends here. Thus, *Shouman* presents no persuasive authority with respect to Davis' argument that Subsection (3) requires the State to prove, in addition to knowledge of possession or transportation of cigarettes, that a defendant had a general awareness that such possession or transportation was in violation of the TPTA. Further, to the extent that *Shouman* could somehow be construed as providing notice that the conduct with which Davis has been charged is unlawful under the TPTA, any such notice would only apply prospectively. *Shouman* was decided nearly a year after the underlying conduct charged in this case.

D. The Court of Appeals Erred in Finding that the Record Evidence Was Sufficient to Establish Probable Cause that Davis Even Knew that He Possessed or Was Transporting Cigarettes.

1. Standard of Review

A trial court's decision to bind a defendant over for trial is reviewed for an abuse of discretion. *People v. Stone,* 463 Mich. 558, 561 (2001). To bind a defendant over for trial, the court must conduct a PE to determine if there is probable cause to believe that a crime was committed and that the defendant committed it. *People v. Fielder*, 194 Mich. App. 682, 689 (1992); MCL § 766.13; MCR 6.110(E). Probable cause requires a quantum of evidence sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the defendant's guilt. *People v. Yost*, 468 Mich. 122, 126 (2003). There must be evidence to establish each and every element of the offense charged or evidence from which those elements may be inferred. *Wayne County Prosecutor v. Recorder's Court Judge*, 92 Mich. App. 119, 122 (1979). As the Michigan Supreme Court has emphasized, the PE serves to "weed out groundless

[12] It is important to note that, although *Shouman* was decided in 2016, well after the Legislature's 2008 amendments to MCL § 205.428, which strongly suggest that the Legislature did intend to require actual knowledge of violating the TPTA, *Shouman* did not address the legislative history.

and unsupported charges of grave offenses and to relieve the accused of the degradation and the expense of a criminal trial and of the deprivation of his liberty if there is no probable cause for believing that he is guilty of the crime." *People v. Duncan*, 388 Mich. 489, 501 (1972) (citing 21 Am. Jur. 2d, Criminal Law, § 443 at 446-47), *reversed on other grounds,* 464 Mich. 266 (2001).

2. The Court of Appeals Erred in Affirming Davis' Bindover Because the State Presented No Evidence that Davis Knew that He Was Transporting Cigarettes

The State failed to present sufficient evidence that Davis knew he was transporting cigarettes and, thus, failed to establish probable cause that Davis violated Subsection (3)—even under the lower intent element adopted by the trial court. Indeed, even the Court of Appeals conceded that "Davis argues accurately that, at this stage in the proceedings, the prosecutor has not offered any *direct* evidence that he knew that he was transporting cigarettes." (Appendix A, Decision at 5) (emphasis in original). The Court of Appeals however erred in finding sufficient circumstantial evidence of such knowledge. The purported "evidence" is a mixture of statements by a co-defendant that neither actually incriminate Davis nor are admissible against Davis in any way; inferences that are mere speculation; and *exonerating* statements by Davis that the Court of Appeals inexplicably characterizes as evidence of guilt. Even the trooper that stopped Davis never testified that he had any reason to think that Davis had knowledge of the actual contents of the trailer.

a. Magnant's Statements Are Not Admissible Against Davis and Are No Evidence of Davis' Knowledge.

The Court of Appeals inexplicably and improperly relied on purported statements by Co-Defendant Magnant regarding his *own* knowledge—not *Davis'* knowledge—to find probable cause that Davis knew that he was transporting cigarettes. Magnant purportedly stated that "he loaded the cigarettes and that his work involved transporting cigarettes for the KBIC." (Opinion

at 5). The Court of Appeals found that this was "circumstantial evidence that [D]efendant Davis, as the driver of the truck, was complicit in delivering *what his codefendant knew* were cigarettes." (Appendix A, Decision at 6) (emphasis added). Critically, the Court of Appeals does *not* claim that the statement is direct evidence that *Davis* knew that he was delivering cigarettes. Thus, the "evidence" is not relevant to or admissible on the issue of whether Davis knowingly transported cigarettes. Davis is not charged with transportation of "what his co-defendant knew were cigarettes"—indeed, that is not a crime. The Court of Appeals' finding is not supported by facts in the record or its own reasoning.

Even if Magnant's statement somehow incriminated Davis, it is improper for the Court to rely on it as "circumstantial evidence" of what Davis knew. A defendant is deprived of his Sixth Amendment confrontation rights when a co-defendant's incriminating confession is introduced at their joint trial, even if the jury is instructed to consider the confession only against the co-defendant. *Bruton v. United States*, 391 U.S. 123 (1968). The district court may only rely on admissible evidence to bind a defendant for trial. *People v. Kubasiak*, 99 Mich. App. 529 (1980). Even the prosecution recognized that it would be improper to use Magnant's statement against Davis. When the State presented the evidence of Magnant's statements, through the testimony of Detective Ryan, Davis' counsel promptly objected, to which the State responded that "these statements are only directed toward Mr. Magnant." (PE at 62) (emphasis added). Nonetheless, the Court of Appeals inexplicably disregarded constitutional and evidentiary rules to rely on evidence that is inadmissible against Davis to justify its decision.

b. The Amount of Cigarettes in Sealed Boxes in the Trailer is Not Evidence that Davis Knew What Was in the Trailer.

The "volume" of cigarettes in sealed boxes in a locked trailer is not evidence that the employee driver knows the contents of the trailer without some additional facts being adduced. If

the driver did not pack, load, or see the boxes, then he had no way of knowing the contents of a locked trailer—and that is true whether the trailer contains one (1) box or one hundred (100) boxes. Curiously, the Court of Appeals found probable cause existed as to Davis' knowledge by inferring that the "sheer volume [of cigarettes] made it *less likely* that [D]efendant Davis did *not* know what was in the truck [*sic*]."[13] (Decision at 6) (emphasis added). But "less likely that the defendant did not know" is not a legal standard and does not establish affirmative or circumstantial proof of knowledge. The Court of Appeals did not go so far as to find that the "volume" of cigarettes was evidence of what Davis *did* know. There was no record evidence that Davis loaded the trailer,[14] was present when the trailer was being loaded, or otherwise ever laid eyes on the inside of the trailer prior to opening it for the trooper.

The Court of Appeals may have suspected or had a "hunch" that, if Davis was driving the truck, then he must have known what was being hauled. But the *record evidence* did not establish that fact. A bind over determination requires more than an assumption or a "hunch" or a "suspicion." *See People v. Shepard Fairey,* No. 333805, 2018 Mich. App. Lexis 3084, at *7 (Aug. 28, 2018). The Court of Appeals' opinion ignores that well-worn principle. Further, to the extent that the Court of Appeals believed that the amount of cigarettes established constructive knowledge, that, too, was an improper inference for a bind over. A knowledge requirement in a statute does not include constructive knowledge, unless the Legislature specifically included a

[13] There were no cigarettes in the truck itself. Further, all of the cigarettes were in sealed boxes in a locked trailer attached to the truck. Nor was there any testimony that would have even arguably established or allowed an inference that someone at KBIC told the driver what product he was hauling.

[14] Indeed, the trooper testified that he specifically asked Davis whether he had packed the trailer and Davis answered that he had not. (PE at 41-42).

statutory phrase like "should have known." *See Echelon Homes, LLC v. Carter Lumber Co,* 472 Mich. 192, 197-198 (2005). Subsection (3) does not include such language.

c. There Is Nothing in Davis' Statements or Demeanor that Is Evidence of His Knowledge

Davis made several exonerating statements during the stop and, importantly, the State presented no evidence that Davis was anything but truthful when he made those statements. The trial court and the Court of Appeals both engaged in improper speculation and unwarranted inference in concluding that these exonerating statements, as well as some unarticulated aspect of Davis' "demeanor," were circumstantial evidence that Davis knew that he was transporting cigarettes. Specifically, the Court relied on Davis' statement to Lajimodiere that "he [Davis] was working" and concluded that "it would be reasonable to infer that defendant Davis was as aware of his work assignment as was defendant Magnant." (Appendix A, Decision at 6). But, there was absolutely no evidence describing Davis' work assignment, other than that he was a non-supervisory person employed by KBIC and was driving the truck and hauling a trailer as part of his employment. The State offered no evidence of any details regarding the nature of Davis' work assignment or, more importantly, Davis' actual knowledge of any such details.

The Court of Appeals also noted that the district court relied on "the statements [that] [D]efendant Davis made to police and his demeanor on the video recording as evidence that [D]efendant Davis knew that there were cigarettes in the trailer." (*Id.*) The Court of Appeals, however, did not explain how Davis' statements or demeanor indicated knowledge that he was transporting cigarettes. In fact, Davis' statements and demeanor actually exonerate rather than inculpate him:

- Lajimodiere testified that he asked Davis if anybody would "jump out of the trailer" and Davis allegedly responded, "um, there's just chips and stuff in there, and he

kept just going on." (PE at 40). Neither the Court of Appeals majority nor the examining magistrate explain how one makes the inferential leap from this response to the evidentiary conclusion that Davis knew that there were cigarettes in the trailer.

- Lajimodiere also testified that he asked Davis if he "knew that the stuff was back there" and Davis allegedly responded, "I'm just a worker." (PE at 20). Davis' did not say "yes," or "I guess I did." Rather his words actually indicate the he did not know precisely what cargo he was transporting—that is, he was "just a worker" and did not make decisions or have any knowledge in that regard. This testimony fails to support a finding that Davis knew that he was in possession of or transporting cigarettes.
- Lajimodiere testified that, when Davis opened the door to the trailer, he said, "here you go, boss." (PE at 19, 37, 39). These words reflect nothing more than Davis' acknowledgment of or acquiescence to the trooper's request to open the trailer. The statement allows no inference as to precisely what, if anything, was in the trailer. If anything, Davis' willingness to open the trailer upon the trooper's request—rather than refusing to cooperate or insisting that the trooper obtain a warrant—is evidence that Davis believed that he had done nothing wrong and had nothing to hide.

Inferences regarding Davis' "demeanor" are even more groundless. The magistrate did not explain what it was about Davis' demeanor (*e.g.,* how he looked, behaved, acted), as reflected in the record evidence, that pointed to any knowledge of the trailer's contents as courts require in stop and frisk or other circumstances justifying a finding of reasonable suspicion. Broadly citing

"demeanor" as a reason to impute knowledge of a specific fact is no more helpful or reliable than saying that a defendant charged with a particular offense "looked guilty" so he must be. In short, the State failed to present any evidence that Davis knew that he was transporting cigarettes and, thus, failed to establish the threshold of probable cause that Davis violated Subsection (3).

E. The Court of Appeals Erred by Denying Defendants' Joint Motion to Dismiss for Due Process Violation

1. Standard of Review

Constitutional issues, including those relating to due process, are reviewed *de novo* by this Court. *Wayne Co. v. Hathcock,* 471 Mich. 445, 455 (2004); *People v. McGee,* 258 Mich. App. 683, 699 (2003).

2. The TPTA Licensing Provisions and the Charge

Davis is charged with a single count of violating the TPTA, specifically, MCL § 205.428(3), by virtue of not having a transporter license as purportedly required by MCL § 205.423(1). The pertinent sections for analysis in this case are:

> MCL § 205.428(3):
>
> A person who possesses, acquires, transports, or offers for sale contrary to this act 3,000 or more cigarettes . . . is guilty of a felony, punishable by a fine of not more than $50,000.00 or imprisonment for not more than 5 years, or both.
>
> MCL § 205.423(1):
>
> ...[A] person shall not purchase, possess, acquire for resale, or sell a tobacco product as a manufacturer, wholesaler, secondary wholesaler, vending machine operator, unclassified acquirer, transportation company, or transporter in this state unless licensed to do so.

MCL § 205.422(y):

> Transporter means a person importing or transporting into this state, or transporting in this state, a tobacco product obtained from a source located outside this state, or from any person not duly licensed under this act. Transporter does not include an interstate commerce carrier licensed by the interstate commerce commission to carry commodities in interstate commerce, or a licensee maintaining a warehouse or place of business outside of this state if the warehouse or place of business is licensed under this act.

MCL § 205.422(o):

> Person means an individual, partnership, fiduciary, association, limited liability company, corporation, or other legal entity.

Importantly, the TPTA specifically provides that, with respect to transporters and certain other classes (i.e. manufacturers, wholesalers, secondary wholesalers, vending machine operators, and unclassified acquirers), "each place of business shall be separately licensed"; it does not require separate licenses for each employee of such classes. *See* MCL § 205.423(2); MCL § 205.422(p). Further, the TPTA itself requires, among other things, that each applicant for a license show proof of the following:

- "[t]he applicant's financial responsibility, including but not limited to, satisfactory proof of a minimum net worth of $25,000.00"; and
- "[t]hat the applicant owns, or has an executed lease for, a secure nonresidential facility for the purpose of receiving and distributing cigarettes and conducting its *business* if the applicant owns or has an executed lease for such a facility."

MCL § 205.423(6)(a), (b)(emphasis added).

Notably, the TPTA specifically authorizes Treasury to adopt rules for the administration of the Act, MCL § 205.433(2), and also provides that "[t]he application for licensure shall be on a form prescribed by the department...." MCL § 205.423(2). The prescribed form, Treasury Form

336, requires only a "business" engaged in the transportation of tobacco products to obtain a transporter license—as opposed to requiring each individual employee to obtain his own license. (*See* PE at 109-111; Appendix B). It expressly limits eligibility for a transporter license to "[a] *business* that imports or transports into this state, or transports in this state, cigarettes or other tobacco products obtained from a source located outside this state, or obtained from a person that is not a Michigan tobacco tax licensee," and otherwise requires certain application information for the "*business.*" (Appendix B) (emphasis added). Because the TPTA itself specifically mandates that the license "application shall be on a form prescribed by" Treasury, MCL § 205.423(2), it incorporates that form as well as its contents into the licensing provisions. Thus, Treasury Form 336 adds to the lack of "fair warning" and legal ambiguity in this case. Since the TPTA was enacted over 25 years ago, Treasury has not adopted any other rule, regulation, or guideline advising that individual employees are required to obtain a "transporter" license to deliver tobacco products for their employer.

3. The TPTA Does Not Give Fair Notice that the Charged Conduct is Prohibited

Charging Davis with a felony for transporting cigarettes without a transporter license in violation of Subsection (3) violates his rights to due process of law, as guaranteed by the United States and Michigan Constitutions. It is fundamental that "[n]o person may be deprived of life, liberty, or property without due process of law." United States Const., Am. V; Mich. Const. 1963, Art. 1, § 17. Due process of law requires that "a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *People v. Hall*, 499 Mich. 446, 460-61 (2016). A vague law violates the right to due process of law by failing to provide fair warning that particular conduct is prohibited; the law must provide a person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he or

she may act accordingly. *People v. Howell*, 396 Mich. 16, 20 n.4 (1976); *see also People v. Assy*, 316 Mich. App. 302, 305 (2016).

A criminal statute fails to provide "fair warning" if individuals of reasonable intelligence are left "to guess at or meaningfully differ in opinion regarding what conduct is proscribed." *People v. Mesick,* 285 Mich. App. 535, 545 (2009). Conversely, "a 'statute is sufficiently definite if its meaning can fairly be ascertained by reference to judicial interpretations, the common law, dictionaries, treatises, or the commonly accepted meaning of words.'" *Id. (citing People v. Noble*, 238 Mich. App. 647, 651-652 (1999)). The TPTA licensing provisions do not give fair notice to workers who transport tobacco products as part of their employment that they must individually obtain a transporter license; in fact, the plain language of the TPTA and Treasury Form 336 require the conclusion that a mere low-level employee like Davis would not even be eligible for a license.

a. By its Plain Terms, the TPTA Does Not Impose a License Requirement on Employees of an Entity Subject to the Licensing Provisions

There is no fair notice in the TPTA itself to a person employed as truck-driver that one could face felony charges if it should happen that the cargo that he is assigned to transport includes cigarettes. The Court of Appeals incorrectly dismissed Davis' argument as "focus[ing] not on the language of the relevant statutes, but rather on the interpretation of that language by two Department of Treasury employees." It is true, as discussed in further detail below, that Treasury's interpretation of the TPTA's licensing provisions supports Davis' argument. But the Court of Appeals' criticism is misplaced because Treasury—and Davis—reached this conclusion based on the language of the TPTA itself, which cannot fairly be read as requiring each individual employee of a "transporter" business to obtain his own transporter license.

The license requirements apply to any "person" that is a transporter (or other category of licensee), MCL § 205.423(1). A "person" is defined as "an individual, partnership, fiduciary,

association, limited liability company, corporation, or other legal entity," MCL § 205.422(o). Significantly, the definition of "person" does not specifically include employees of any of the enumerated legal entities. Reading all of the relevant provisions of the TPTA in *para materia,* it is appropriate to interpret "individual" as inclusive only of an individual operating a business on his own account. This reading is consistent with the nature of the other nouns listed in the definition of "person"—business entities—and, thus, is a straightforward application of *ejusdem generis*, one of the fundamental rules of statutory construction. *People v. Jacques*, 456 Mich. 352, 357-58 (1998) ("[T]he statute before us does contain a list of specific words, all of which are of the same kind, class, . . . or nature. It is exactly the type of statute where the doctrine of *ejusdem generis* has traditionally been used . . . ."). Any other interpretation renders the statutory terms superfluous. It would make no sense to require a company, corporation, or other entity to obtain a license if every individual comprising the entity is also required to obtain a license.

Furthermore, as discussed above, the TPTA itself, when read in its entirety, imposes requirements on license applicants that only make sense—and likely could only be satisfied—if applied to a business entity rather than an employee of such a business. For example, a license applicant must prove "a minimum net worth of $25,000." *See* MCL § 205.423(6)(a). This would be an onerous, if not impossible, requirement for low-level employees who might earn minimum wage. Similarly, the TPTA expressly requires, with the exception of transportation companies, all other licensees, including transporters, to obtain a separate license for "each place of business," not each employee *See* MCL § 204.422(p). MCL § 205.423(2) (further providing that "[e]ach license or a duplicate copy shall be prominently displayed on the premises covered by the license").

Requiring every employee to obtain a separate license for each of their employer's places of business would be onerous and impose an unnecessary burden on the employee, not to mention

the agency that processes the applications. There is nothing in the TPTA that is sufficient to give Davis, or any similarly-situated person, reason to believe that his employment as a truck driver on December 11, 2015, could result in felony prosecution for failure to comply with a tax provision. *See Marinello v. United States,* 138 S.Ct. 1101, 1108 (2018) (holding that the offense of impeding administration of the Internal Revenue Code is void for vagueness because it created circumstances where minor tax infractions—e.g., keeping certain receipts—could become felonies and "we sincerely doubt that persons engaging in the described behavior would believe they are facing felony prosecution for tax obstruction").

The reading of the TPTA advanced by Davis here is also consistent with the holding of another panel of the Court of Appeals that the TPTA tobacco retail record-keeping requirements applied only to a person "who operates a place of business" and, thus, that only a manager with "control over the business's day to day operations" could be subject to criminal penalties for violation of the record-keeping requirements—but "a cashier or stocker" would presumably not control business operations and, thus, not be subject to such penalties. (Appendix A, Decision at 7) (discussing *People v. Assy,* 316 Mich. App. 302 (2016)). The Court of Appeals dissent here found that the statutory transporter licensing requirements—including the net worth requirement and obligation to obtain a license for each place of business—showed "that licensure is, much like the situation in *Assy,* linked to some degree of meaningful control" and does not apply to mere employees. (*Id.*, Dissent at 4.)

The majority incorrectly found that *Assy* is distinguishable, improperly focusing on the plain meanings of "transporter" and "person" under the TPTA—without reading such terms *in pari materia* with the other pertinent statutory provisions bearing on their meaning (i.*e.,* simply reasoning that a "transporter" is a person who "transports" and "transport" is a physical action that

can be carried out by an individual driver such that the driver is required to be licensed). (*Id.*, Decision at 7.) The majority's reasoning does not, however, hold up—it fails to account for the greater statutory framework that is inconsistent with requiring individual employees to be licensed, as discussed above. Moreover, as the dissent pointed out, the majority's approach is not consistent with advancing the TPTA's purpose of ensuring that tobacco taxes are collected—instead, the TPTA becomes a needlessly punitive scheme that inflicts severe punishment on workers for technical violations of law that cause no harm to the public. The *Assy* Court took the correct approach to interpreting the TPTA and the Court of Appeals panel here should have followed it.

b. Treasury Applied the Plain Terms of the TPTA's Licensing Provisions for Guidance on its Form 336 as well as in its Testimony at the PE—the License Requirement Does Not Apply to Mere Employees

It is not just the case that the TPTA fails to provide fair notice that a low-level employee like Davis must obtain a transporter license—and could face felony charges if he does not. Rather, the TPTA itself as well as the application form that it requires—Form 336—affirmatively leads employees like Davis to believe that they would not be required to obtain a license and, indeed, would not even be eligible for one. The Court of Appeals erred in finding that Davis could not rely on the legal interpretative evidence of the TPTA as disseminated by the agency and officials charged with the administration of the law. Treasury's construction should be given deference because it is not clearly wrong and another construction is not plainly required. *See ACCO v. Dept. Treasury,* 134 Mich. App. 316, 322; *see also In Re: Complaint of Rovas*, 482 Mich. 90, 117-118 (2008); *Fulman v. United States,* 434 U.S. 528, 533 (1978).

At the time of the alleged offense, Treasury's only guidance to potential TPTA license applicants was Form 336, the license application that, importantly—the TPTA itself expressly requires. Form 336 states that only a "business" involved in transporting tobacco needs a

transporter license and otherwise requires certain application information for the "*business*" – as opposed to requiring each individual employee of a business to obtain his or her own license. (*See* PE at 109, 111; Appendix A, Form 336) (emphasis added). Treasury's handling of the issue in Form 336 was not an anomaly or mistake; rather, it expressed a sound and careful understanding of the TPTA licensing system, as evident in the statute itself, and by the Treasury officials charged with carrying it out. Angela Littlejohn, the manager of Treasury's Tobacco Tax Unit, testified at the PE and confirmed that the TPTA's license provisions do not require employees to obtain a license separate from their employer.

> The Court: So let me just ask if an employee of a wholesaler was a transporter, does that individual need a license to move the product?
>
> The Witness: No.

(PE at 102).

Ms. Littlejohn also testified that the TPTA does not require an individual employee to secure a transporter license to pick up or deliver tobacco products for and on behalf of his employer.

> Q Now, if I'm a wholesaler, right, which I think Mr. Grano was asking, so I'm a wholesaler and I am going to sell my tobacco, I gotta get my tobacco from my warehouse to my customer, correct?
>
> A Correct.
>
> Q Okay. And I have an employee, Mr. Davis is my employee, let's say, and I say, Mr. Davis, this customer bought 56 cases of tobacco products, *i.e.,* cigarettes, can you drive them over to my customer who is a mile away. He does. Does he need a transporter's license?
>
> A No.

(PE at 106).

Doug Miller, the Administrator of Special Taxes for Treasury, testified that the scope of his employment involved making sure that taxes are being properly administered pursuant to the TPTA. (PE at 118). Mr. Miller stated that an applicant could rely on the information set forth on Form 336. (PE at 121-22).[15]

Treasury's position, as expressed at the PE and reflected in Form 336, is consistent with the plain terms of the TPTA. Davis had no reasonable basis to believe that Treasury's interpretation of the law was even arguably wrong, much less that another construction was plainly required, especially given the above-discussed provisions in the TPTA itself, which counsel against any reading of it applying to individual employees. *ACCO,* 134 Mich. App. at 322.

c. The Court of Appeals' Ruling is Fundamentally Unfair to Workers, But if its Construction of the TPTA Stands, the Rule of Lenity Forbids Prosecution of Davis

The Court of Appeals' decision creates an impossible situation for Davis and other similarly-situated Michigan workers performing services solely for their employers: Davis cannot rely on the plain terms of the TPTA to determine his legal duties, and he cannot even rely on the interpretation of the TPTA implemented by Treasury. Rather, he is left to the mercy (or lack thereof) of state police and prosecutors, who may now—with the Court of Appeals' blessing—use their investigative and prosecutorial discretion to impose felony charges on workers trapped in that impossible situation.

According to the Court of Appeals, the only recourse for someone in Davis' position would be to embrace the newly-created duty—aptly described in the dissent as "respondeat inferior"—to verify their employer's compliance with the TPTA licensing provisions or suffer the consequences.

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[15] Mr. Miller also testified that he believed that the law on this topic is very unclear and confirmed that Treasury provided no additional guidance or notice with respect to whether or under what circumstances employees must obtain a transporter license. (PE at 135-39).

The Court of Appeals does not explain what an employee should do if they believe their employer is not in compliance. It is not plausible to think that a low-level employee could force compliance, and extraordinarily unfair to expect the employee to forego the chance to earn a living if their employer does not agree on the interpretation of the TPTA. Thus, the Court of Appeals "answer" to the impossible situation only makes it worse.[16]

Davis' position that the TPTA is unconstitutionally vague as applied to him is also supported by the rule of lenity. Grounded in due process, the rule of lenity is a legal principle that provides that any doubt or ambiguity in the enforcement of a criminal statute will be resolved in a defendant's favor. It applies with particular force in a case like this involving complex tax laws, which are to be construed *against* the Government. *Brunswick v. Treasury,* 267 Mich. App. 682, 685 (2005); *Dekoning v. Treasury,* 211 Mich. App. 359, 361 (1995); *Michigan Bell v. Treasury,* 445 Mich. 470, 477 (1994). These rules of construction also support Davis' position, counseling in favor of resolving the doubt or any ambiguity in the TPTA in his favor.

V. CONCLUSION AND REQUEST FOR RELIEF

As the dissent capsulized, allowing the State to proceed in its effort to impose criminal liability on "KBIC's low-level employees not only fails to serve the purposes of the TPTA, but amounts to an overreach that makes a mockery of both the legislature's intent and fundamental justice." (Slip Op. p. 5.) Thus, for all of the reasons stated herein, Davis requests that this Honorable Court reverse the Court of Appeals' decision affirming the trial court's denial of

[16] Indeed, based on the prosecutions here, it appears that the State would have the TPTA require that even the employee *passenger* (Magnant) obtain his own transporter license. (*But see* PE at 135) (Miller, the individual responsible for administering the TPTA, testifying that he is not aware of any Treasury policy indicating whether one or two transporter licenses would be required).

Defendants' Joint Motion to Quash Information and Joint Motion to Dismiss for Due Process Violation and enter an order instructing the trial court to dismiss this case.

Respectfully submitted,

Hertz Schram PC

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Dated: April 2, 2019

STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT
(APPEAL FROM THE MICHIGAN COURT OF APPEALS)

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff/Appellee,

vs.

JOHN FRANCIS DAVIS,

Defendant/Appellant.

_____/

Michigan Supreme Court Docket No. _____

COA No. 341621

Ingham CC: 17-406-FH

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PROOF OF SERVICE

F. Valerie Steiniger, being first duly sworn, deposes and says that on April 2, 2019 I served a copy of Application for Leave to Appeal by placing the same in a United States mail receptacle in Bloomfield Hills, Michigan, with postage fully prepaid thereon, and properly addressed to:

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Michigan Department of Attorney General
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I declare under the penalty of perjury that the statement above is true to the best of my information, knowledge and belief.

/s/ F. Valerie Steiniger
F. Valerie Steiniger